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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF OREGON**

10 **Cathy DeForest, Leon Pyle**
 11 **and Edward Kerwin**

Case No. 11-3159-CL

12 **Plaintiffs**

15 **v.**

COMPLAINT
 for violations of the
 Resource Conservation
 Recovery Act (42 U.S.C.
 6901 et seq.), Clean Water
 Act (33 U.S.C. 1365
 et seq), Endangered
 Species Act(16 U.S.C.
 section 1531 et seq.) and
 for Public and Private
 Nuisance, Trespass,
 Negligence, Negligence
 Per se and Violation of
 ORS 468B.050

21 **City of Ashland,(a municipal subdivision of**
 22 **the State of Oregon) Ashland Gun Club,**
 23 **Inc., (a Domestic Non Profit Corporation)**
 24 **and Chuck Partier, Bill Longiotti, Rick**
 25 **Georgeson, Lee Tuneberg, Mel Winner,**
 26 **Raymond Renteria and Jerry Wisdom**
 27 **(board members of the Ashland Gun Club**
 28 **Inc.), as individuals**

Defendants

1 1. This action is a citizen suit brought pursuant to Section
2 505 of the Federal Water Pollution Control Act (commonly
3 known as the Clean Water Act), 33 U.S.C. Section 1365. This
4 action is also a citizen suit brought pursuant to Section
5 7002(a)(1)(B) of the Solid Waste Disposal Act as amended by
6 the Resource Conservation and Recovery Act, 42 U.S.C Section
7 6972 (a)(1)(B). Thirdly, this action is a citizen suit brought
8 pursuant to section 11 of the Endangered Species Act, 16
9 U.S.C. 1540 (6)(g). This action also includes supplemental
10 claims for private and public nuisance, trespass, negligence and
11 a state water pollution control claim.

12 2. The City of Ashland leases land it owns to the Ashland
13 Gun Club Inc. The land is located at 555 Emigrant Creek Road,
14 Ashland, Oregon, about two miles east of the City proper.

15 3. Defendants have discharged and continue to discharge
16 pollutants from point sources to the waters of the United States
17 without a National Pollution Discharge Elimination System
18 (NPDES) permit, a violation of Section 301 (a) of the Clean
19 Water Act, 33 U.S.C. Section 1311(a). Plaintiff City has also
20 filled wetlands without the required permit, also a violation of
21 Sections 404 and 301 (a) of the Clean Water Act, 33 U.S.C.
22 Section 1311(a). Plaintiffs seek a declaratory judgment,
23 injunctive relief, the imposition of civil penalties, and award of
24 costs, including attorney and expert witness fees. Defendant's
25 unpermitted discharges are in violation of an "effluent standard
26 or limitation" under Section 505(a)(1)(A) of the Clean Water Act,
27 33 U.S.C. Section 1365(a)(1)(A).
28

1 4. Defendants have discharged and continue to discharge
2 pollutants into Emigrant Creek and connected wetlands that
3 constitute a "take" of threatened Coho salmon. Defendants do
4 not have a permit for this "take" of Coho salmon, as required by
5 Section 10 of the Endangered Species Act, 16 U.S.C. Section
6 1539. Plaintiffs seek a declaratory judgment and injunctive relief
7 as authorized by Section 11 (g) (1) (a), 16 U.S.C. Section 1540,
8 the imposition of civil penalties as authorized by Section 11 (a)
9 (1), U.S.C. Section 1540 and award of costs, including attorney
10 and expert witness fees as authorized by Section 11 (g) (4), 16
11 U.S.C. Section 1540.

12 5. Defendants have contributed to and continue to
13 contribute to the past and present handling and disposal of solid
14 and/or hazardous waste which presents an imminent substantial
15 endangerment to health and/or the environment, in violation of
16 42 U.S.C. Section 6972(a)(1)(B). Plaintiff seeks a declaratory
17 judgment, injunctive relief and the award of costs, including
18 attorney and expert witness fees.

19 6. Defendants violated the Oregon Water Pollution Control
20 law (ORS chapter 468B.005 to 468B.035) in its operation of its
21 shooting range, by causing pollution into waters of the State of
22 Oregon.
23

24 7. This Court has subject matter jurisdiction over the claims
25 specified in this complaint, pursuant to 33 U.S.C. Section
26 1365(a), 42 U.S.C. Section 6972(a), and 28 U.S.C. Section
27 1331. This Court also has supplemental jurisdiction over
28 Plaintiff's state law claims, nuisance, negligence and trespass

1 claims pursuant to 28 U.S.C. Section 1367. The relief requested
2 is authorized pursuant to 33 U.S.C. Section 1319 and 1365(a),
3 42 U.S.C. Section 6972, and 28 U.S.C. Sections 2201 and 2202.

4
5 8. On or about August 29, 2011, Plaintiffs gave notice of
6 the Clean Water Act violations specified in this complaint and of
7 its intent to file suit to the Administrator of the U.S.
8 Environmental Protection Agency (EPA), to the Regional
9 Administrator of the EPA, to the Oregon Department of
10 Environmental Quality (DEQ), to Defendants and to Defendant's
11 registered agent, as required by Section 505(b)(1)(A) of the
12 Clean Water Act, 33 U.S.C. Section 1465(b)(1)(A).

13 9. More than sixty days have passed since notice was
14 served, and the Clean Water Act violations complained of in the
15 notice are continuing at this time or reasonably likely to
16 continue. Neither the EPA nor DEQ has commenced or is
17 diligently prosecuting a civil or criminal action to redress the
18 violations.

19
20 10. Defendants remain in violation of the Clean Water Act.

21
22 11. On or about August 29, 2011, Plaintiffs gave notice of
23 the Solid Waste Disposal Act violations specified in this
24 complaint and of its intent to file suit to the Administrator of the
25 U.S. Environmental Protection Agency (EPA), to the Regional
26 Administrator of the EPA, to the Oregon Department of
27 Environmental Quality (DEQ), to Defendants, and to Defendant's
28 registered agent, as required by Section 7002(b)(2)(A) of the
Solid Waste Disposal Act, 42 U.S.C. Section 6972(b)(2)(A).

1
2 12. More than ninety days have passed since notice was
3 served and the Solid Waste disposal Act violations complained
4 of in the notice are continuing at this time or likely to continue.
5 Neither EPA, nor DEQ has commenced or is diligently procuring
6 a civil or criminal action to redress the violations.

7
8 13. Defendants remain in violation of the Solid Waste
9 Disposal Act.

10
11 14. On or about August 29, 2011, Plaintiffs gave notice of
12 the Endangered Species Act violations specified in this
13 complaint and of its intent to file suit to the Administrator of the
14 National Oceanic and Atmospheric Administration, to the
15 Assistant Administrator for Fisheries, NOAA Fisheries (NOAA),
16 to Defendants, and to Defendant's registered agent, as required
17 by Section 16 U.S.C. 1540 (a)(6)(g)(2).

18
19 15. More than sixty days have passed since notice was
20 served and the Endangered Species Act violations complained
21 of in the notice are continuing at this time or likely to continue.
22 NOAA has not commenced, nor is NOAA diligently prosecuting
23 a civil or criminal action to redress the violations.

24
25 16. Defendants remain in violation of the Endangered
Species Act.

26
27 17. Venue is appropriate in the Federal District Court for the
28 District of Oregon pursuant to Section 505(c)(1) of the Clean
Water Act, 33. U.S.C. Section 1365(c)(1); Section 7002(a) of the

1 Solid Waste Disposal Act, 42 U.S.C. Section 6973(a); Section
2 16 U.S.C. 1540 (a)(6)(g)(1)(C) and 28 U.S.C. Section 1391
3 because the source of the violations is located within the District
4 of Oregon.

5 6 **PLAINTIFFS**

7 18. Plaintiff Edward Kerwin owns land near to land owned by
8 Defendant City of Ashland, on which Defendant Ashland Gun
9 Club Inc. operates a shooting range.

10 19. Plaintiff has standing in this suit to protect his own
11 interests. Plaintiff's interests are adversely affected by
12 Defendant's discharges to water, which degrade the receiving
13 waters as fish and wildlife habitat, recreational resources, and
14 sources of aesthetic benefits. Plaintiff's interests are adversely
15 affected by Defendant's handling and disposal of lead shot and
16 lead bullets, which degrade Plaintiff's property and Defendant's
17 property as fish and wildlife habitat, recreational resources and
18 sources of aesthetic benefits.

19
20 20. The interests of Plaintiff Kerwin have been adversely
21 impacted as described in paragraph 21 below.

22
23 21. The recreational, health, aesthetic, environmental and
24 economic interests of Plaintiff Kerwin have been, are being, and
25 will be adversely affected by Defendant's unpermitted
26 discharges of lead into the ground and water and waste
27 handling and disposal practices. Plaintiff uses, enjoys and
28 recreates along Emigrant Creek and Bear Creek and their
tributaries in the immediate vicinity of and downstream from,

1 defendants City of Ashland's property which is leased to the
2 Ashland Gun Club Inc. Defendant's discharges, adversely affect
3 Plaintiff Kerwin's interests, including but not limited to, the
4 following:

5 (a) Plaintiff Kerwin has an aesthetic interest in the natural
6 beauty and biodiversity of the receiving waters in the vicinity of
7 and downstream from Defendant's discharges.

8 (b) Plaintiff Kerwin observes and enjoys wildlife in and
9 around his property in the immediate vicinity of locations where
10 Defendant has disposed of lead shot and lead bullets in the land
11 and water;

12 (c) Plaintiff Kerwin has an aesthetic interest in the natural
13 beauty and biodiversity of his property and its surroundings.

14 (d) Plaintiff Kerwin observes and enjoys wildlife in and
15 around Emigrant Creek and its tributaries in the immediate
16 vicinity of, on, and downstream from, Defendant's discharges.

17
18 22. Plaintiff Cathy DeForest owns land near to land owned
19 by Defendant City of Ashland, on which the Ashland Gun Club
20 Inc. operates a shooting range.

21
22 23. Plaintiff has standing in this suit to protect her own
23 interests. Plaintiff's interests are adversely affected by
24 Defendant's discharges to water, which degrade the receiving
25 waters as fish and wildlife habitat, recreational resources, and
26 sources of aesthetic benefits. Plaintiff's interests are adversely
27 affected by Defendant's handling and disposal of lead shot and
28 lead bullets. The interests of Plaintiff DeForest have been
adversely impacted as described in paragraph 24 below.

1
2 24. The recreational and environmental interests of Plaintiff
3 DeForest have been, are being, and will be adversely affected by
4 Defendant's unpermitted discharges of lead into the ground and
5 water and waste handling and disposal practices. Plaintiff uses,
6 enjoys and recreates along Emigrant Creek and Bear Creek and
7 their tributaries in the immediate vicinity of and downstream from
8 defendants City of Ashland's property which is leased to the
9 Ashland Gun Club Inc. Defendant's discharges, adversely affect
10 Plaintiff DeForest's interests, including but not limited to, the
11 following:

12 (a) Plaintiff DeForest observes and enjoys wildlife, including
13 birds, in and
14 around Emigrant Creek and its tributaries in the immediate
15 vicinity of, and downstream from, Defendant's discharges.
16

17 (b) Plaintiff DeForest has an aesthetic interest in the natural
18 beauty and biodiversity of the receiving waters in the vicinity of
19 and downstream from Defendant's discharges;

20 (c) Plaintiff DeForest observes and enjoys wildlife in and
21 around her property which is in the immediate vicinity of
22 locations where Defendant has disposed of lead shot and lead
23 bullets in the land and water;

24 (d) Plaintiff DeForest has an aesthetic interest in the natural
25 beauty and biodiversity of her property and its surroundings.
26

27 25. Plaintiff Leon Pyle owns land near to land owned by
28 Defendant City of Ashland, on which the Ashland Gun Club Inc.

operates a shooting range.

26. Plaintiff Pyle has standing in this suit to protect his own interests. Plaintiff's interests are adversely affected by Defendant's discharges to water, which degrade the receiving waters as fish and wildlife habitat, recreational resources, and sources of aesthetic benefits. Plaintiff's interests are adversely affected by Defendant's handling and disposal of lead shot and lead bullets. The interests of Plaintiff Pyle have been adversely impacted as described in paragraph 27 below.

27. The recreational and aesthetic interests of Plaintiff Pyle have been, are being, and will be adversely affected by Defendant's unpermitted discharges of lead into the ground and water and waste handling and disposal practices. Plaintiff uses, enjoys and recreates along Emigrant Creek and Bear Creek and their tributaries in the immediate vicinity of and downstream from, defendants City of Ashland's property which is leased to the Ashland Gun Club Inc. Defendant's discharges, adversely affect Plaintiff Pyle's interests, including but not limited to, the following:

(a) Plaintiff Pyle observes and enjoys wildlife in and around Emigrant Creek and its tributaries in the immediate vicinity of, and downstream from, Defendant's discharges;

(b) Plaintiff Pyle has an aesthetic interest in the natural beauty and biodiversity of the receiving waters in the vicinity of and downstream from Defendant's discharges;

(c) Plaintiff Pyle observes and enjoys wildlife in and around

1 his property in the immediate vicinity of locations where
2 Defendant has disposed of lead shot and lead bullets in the land
3 and water;

4
5 (d) Plaintiff Pyle has an aesthetic interest in the natural
6 beauty and biodiversity of his property and its surroundings.

7
8 **DEFENDANTS**

9 28. Defendant, City of Ashland ("City") is a municipal
10 subdivision of the State of Oregon. The City owns 65 acres of
11 land along Emigrant Creek. It has leased 32 acres to the
12 Ashland Gun Club Inc. for the use of a gun club.

13 29. Defendant, Ashland Gun Club Inc. leases the City's land
14 and operates a shooting range at 555 Emigrant Creek Road,
15 approximately two miles east of the City of Ashland, Oregon.

16
17 30. Defendants Chuck Partier, Bill Longiotti, Rick
18 Georgeson, Lee Tuneberg, Mel Winner, Raymond Renteria and
19 Jerry Wisdom are being sued as individuals and are board
20 members of the Ashland Gun Club, Inc.

21
22 **FACTS**

23 31. The Ashland Gun Club's shooting range includes
24 numerous rifle ranges, a shotgun range and numerous pistol
25 ranges.

26 32. Shooting of some kind has taken place at the City's
27 property by the Ashland Gun Club, Inc. since at least 1964.
28

1 33. Emigrant Creek flows in a westerly direction through the
2 City's property.

3
4 34. Shortly downstream from City's property, Emigrant
5 Creek flows into Bear Creek, which flows into the Rogue River.

6
7 35. The general fire of the shotgun range and rifle ranges is
8 toward Emigrant Creek.

9
10 36. The general fire of all of the ranges is into or toward
11 jurisdictional wetlands that are waters of the United States and
12 waters of the State of Oregon.

13 37. The shotgun range includes a "clay pigeon" range where
14 the general direction of fire is towards Emigrant Creek.

15
16 38. Bullets, shot, shell casings and debris from clay targets
17 are "pollutants" as that term is defined under the Clean Water
18 Act.

19
20 39. The shooting of firearms at the City's property has
21 resulted and will continue to result in numerous and repeated
22 discharges of pollutants (including, but not limited to, bullets,
23 shot, shell casings and debris from clay targets) to waters of the
24 United States, including, but not limited to discharges to
25 Emigrant Creek and its associated wetlands.

26
27 40. Defendants are responsible for the aforementioned
28 discharges.

1 41. Defendants do not have a National Pollution Discharge
2 Elimination System (NPDES) permit issued pursuant to the
3 Clean Water Act that allows them to discharge pollutants into
4 the waters of the United States.

5 42. Defendant's violations of the Clean Water Act have been
6 numerous and repeated.

7 43. Because of Defendant's history of repeated discharges
8 in the absence of an NPDES permit, Plaintiff believes and
9 alleges that, without the imposition of appropriate civil penalties
10 and issuance of an injunction, defendant will continue to violate
11 the Clean Water Act on a regular or intermittent basis to the
12 further injury of Plaintiff and others. Prior to the trial, Plaintiff
13 intends to amend this complaint to include any previously
14 undiscovered violations and/or violations occurring subsequent
15 to the most recent information available at the time that this
16 complaint was prepared.

17 44. All of Defendant's aforementioned discharges to waters
18 are discharges from point sources into navigable waters of the
19 United States within the meaning of Section 301 of the Clean
20 Water Act, 33 U.S.C. Section 1311.

21 45. Emigrant Creek constitutes "waters of the United States."

22 46. Lead bullets and lead shot are "solid waste" as that term
23 is defined under the Solid Waste Disposal Act.
24
25
26
27
28

1 47. Lead bullets and lead shot are "hazardous waste" as that
2 term is defined under the Solid Waste Disposal Act.

3
4 48. The shooting of firearms at the City's land by the
5 Ashland Gun Club Inc. has resulted and will continue to result in
6 the disposal of lead bullets, lead shot, shells and clay pigeon
7 debris onto Plaintiff's and Defendant's property.

8 49. Defendants are responsible for the aforementioned
9 disposal of lead bullets, lead shot, shells and clay pigeon debris
10 onto Plaintiff's and Defendant's property.

11
12 50. Defendant's handling and disposal of lead bullets and
13 lead shot presents an imminent and substantial endangerment
14 to health and/or the environment.

15
16 51. The Southern Oregon/Northern California Coasts Coho
17 ("Coho") Evolutionary Significant Unit ("ESU") was listed as
18 "threatened" under the Endangered Species Act ("ESA") on May
19 6, 1997.

20
21 52. Critical habitat that includes Emigrant Creek was
22 established for the Coho on May 5, 1999.

23
24 53. The discharge of lead shot and bullets and debris from
25 clay targets into the ground and water and the resulting
26 contamination of the ground and water constitute a "take" of the
27 Coho within the meaning of Section 9 of the Endangered
28 Species Act, 16 U.S.C. 1538.

1 54. The shooting of firearms at the City's land by the
2 Ashland Gun Club Inc. has resulted and will continue to result in
3 the "take" of Coho in Emigrant Creek.

4
5 55. Defendants are responsible for the aforementioned
6 "take" of Coho salmon on Emigrant Creek.

7
8 56. Since at least 2000, Defendants, with the aid of
9 construction equipment, have repeatedly discharged fill material
10 below the ordinary high water mark of Emigrant Creek and into
11 jurisdictional wetlands which are connected to Emigrant Creek.
12 This discharge of fill material occurred along the entire south
13 bank of Emigrant Creek within the City's property. This fill
14 included street sweeper debris and other fill from Defendant City
15 and the scraping and fill of other areas by the Ashland Gun Club
16 Inc. in order to make shooting ranges on the property.

17 57. Defendants did not obtain a dredge and fill permit
18 authorizing the filling activities described in the preceding
19 paragraph from the United States Army Corps. of Engineers
20 ("Corps"), nor did Defendants obtain a fill removal permit
21 authorizing the filling activities from the Oregon Division of State
22 Lands ("DSL") prior to engaging in these filling activities, nor has
23 Defendant City obtained such permits from the Corps. or DSL
24 since engaging in these filling activities.

25
26 58. Emigrant Creek and the interconnected jurisdictional
27 wetlands constitute "waters of the United States" as that term is
28 interpreted under the Clean Water Act.

1 59. Emigrant Creek constitutes "waters of this state" as that
2 term is defined by Oregon Revised Statutes, Section
3 196.800(14).

4
5 60. The fill material discharged by Defendants constitutes
6 "pollutants" as that term is interpreted under the Clean Water
7 Act.

8
9 61. The construction equipment used by Defendants in
10 discharging fill material into the wetlands on the south side of
11 Emigrant Creek constitutes "point sources" as that term is
12 interpreted under the Clean Water Act.

13 62. At least 100,000 cubic feet of fill material discharged by
14 Defendants to the wetlands on the south side of Emigrant Creek
15 remains there today, below where the ordinary high water mark
16 was located prior to Defendant City's discharge of fill material
17 beginning in 2000.

18
19 63. Defendants are responsible for the aforementioned
20 discharges.

21
22 64. In light of Defendants City's discharges in the absence of
23 a dredge and fill permit or fill-removal permit, Plaintiffs believe
24 and allege that, without the imposition of appropriate civil
25 penalties and issuance of an injunction, Defendant City will
26 continue to violate the Clean Water Act to the further injury of
27 Plaintiffs and others. Prior to trial, Plaintiffs intend to amend this
28 complaint to include any previously undiscovered violations

1 and/or violations occurring subsequent to the most recent
2 information available at the time this complaint was prepared.

3
4 65. All of Defendants' aforementioned discharges to waters
5 are discharges from point sources into navigable waters of the
6 United States within the meaning of Section 301 of the Clean
7 Water Act, 33 U.S.C. § 1311.

8
9 66. Defendants City and Ashland Gun Club Inc. have owned
10 and operated the shooting range in a manner that has created
11 nuisances in the forms of noise from gunfire; pollution of water
12 with lead, arsenic and other hazardous materials; and risk of
13 bullet strikes beyond the boundaries of Defendant's land.

14
15 67. Defendants City and Ashland Gun Club Inc. operated the
16 shooting range without adequate supervision of individuals to
17 prevent unlawful and unauthorized activity at the shooting range.

18
19 68. Defendant's ownership and operation creates extremely
20 loud and shocking noises from gunfire.

21
22 69. Defendant's ownership and operation of the shooting
23 range has regularly continuously, and repeatedly caused errant
24 bullets and a zone of danger of bullet strikes on Plaintiff's land,
25 placing Plaintiff at unreasonable risk of bullet strikes without
26 warning.

27
28 70. Defendant's shooting activities at the shooting range
creates trespass by bullet strikes and trespassory noise which
intrudes upon Plaintiff's land.

1
2 71. Defendant's shooting activities at the shooting range
3 creates trespassory contamination with hazardous substances,
4 which intrude upon Plaintiff's land.

5
6 72. Defendant's actions harmed Plaintiffs by causing loss of
7 the use and enjoyment of his land, loss of exclusive possession
8 of their land, diminution in the value of his land, mental anguish
9 from enduring Defendant's invasions and interferences, and
10 continuing and consequential damages.

11 12 **COUNT 1**

13 **Discharge of Pollutants Not Authorized by a** 14 **NPDES Permit** 15

16 73. Plaintiffs incorporate by reference paragraphs 1 through
17 72.

18
19 74. Section 301(a) of the Clean Water Act, 33 U.S.C. §
20 1311(a), prohibits the discharge of pollutants from a point source
21 into navigable waters of the United States, except in compliance
22 with various enumerated sections of the Clean Water Act.
23 Section 301(a) prohibits, inter alia, such discharges not
24 authorized by an NPDES permit issued pursuant to Section 402
25 of the Clean Water Act, 33 U.S.C. § 1342.

26
27 75. Oregon Revised Statutes § 468B.050 prohibits the
28 discharge of any pollutant unless such discharge is specifically
permitted in an NPDES permit.

1
2 76. Defendant's discharges have violated and continue to
3 violate Section 301(a) of the Clean Water Act, 33 U.S.C. §§
4 1311(a) and ORS 468B.050.
5

6 **COUNT 2**

7 **Past and Present Handling and Disposal of Solid**
8 **and Hazardous Waste Which Presents an Imminent**
9 **and Substantial Endangerment to Health or the**
10 **Environment**
11

12 77. Plaintiffs incorporated by reference paragraphs 1
13 through 76.
14

15 78. Section 7002(a)(1)(B) of the Solid Waste Disposal Act,
16 42 U.S.C. § 6972(a)(1)(B), prohibits contribution to the past or
17 present handling or disposal of any solid or hazardous waste
18 which may present and imminent and substantial endangerment
19 to health or the environment.
20

21 79. Defendant's handling and disposal of lead bullets, lead
22 shot, shells and clay pigeon debris have been in violation of, and
23 continue to be in violation of Section 7002(a)(1)(B) of the Solid
24 Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B).
25
26
27
28

COUNT 3

**Contamination of land, soil and water constitutes
“take” of threatened Coho Salmon**

80. Plaintiffs incorporate by reference paragraphs 1 through 79.

81. Section 9 of the Endangered Species Act, 16 U.S.C. 1538(a)(1)(B) prohibits the “take” of threatened Coho Salmon without a permit.

82. Defendants do not possess a permit to “take” threatened Coho Salmon.

83. Defendants’ activities at the gun club property, including the discharge of lead shot, lead bullets, shells and clay pigeon debris into the waters of Emigrant Creek constitutes a “take” of threatened Coho salmon.

84. Defendant’s discharge of lead shot, lead bullets and clay pigeon debris into the waters of Emigrant Creek have been a violation of, and continue to be in violation of section 9 (a)(1)(B) of the Endangered Species Act, 16 U.S.C. 1538 (a)(1)(B).

COUNT 4

**Discharge of Pollutants not Authorized by
Federal or State Fill Permit**

85. Plaintiffs incorporate by reference paragraphs 1 through 84.

86. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, except in compliance with various enumerated sections of the Clean Water Act. Section 301(a) prohibits, inter alia, such discharges not authorized by a dredge and fill permit issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. §1344.

87. Oregon's Removal-Fill Law (ORS §§ 196.800-196.990) prohibits the filling of any "waters of this state without a permit issued under authority of the Director of the [Oregon] Division of State Lands." ORS § 196.810(1)(a).

88. Defendants' discharges have violated and continue to violate Section 301(a) the Clean Water Act, 33 U.S.C. §§ 1311(a), and Oregon Revised Statutes § 196.810(1)(a).

COUNT 5

Private Nuisance (Kerwin only)

89. Plaintiffs incorporate by reference paragraphs 1 through 88.

90. Plaintiff suffers significant harm from the invasion of his interest in the private use and enjoyment of his land as a direct result of the following private nuisances emanating from Defendant's shooting range: noise, water pollution, other pollution, and risk of bullet strikes.

COUNT 6

Public Nuisance

91. Plaintiffs incorporate by reference paragraphs 1 through 90.

92. Defendant's conduct causes significant interferences with the public health, safety, peace, comfort, and convenience and is of a continuing nature that the Defendant knows, or has reason to know, is of a type that has a significant detrimental effect upon these public rights. This unreasonable interference with these common rights of the general public directly results from the public nuisances emanating from Defendant's shooting range, including those of gunfire noise, water pollution, land pollution and risk of bullet strikes as more fully set forth above. Plaintiffs have suffered harms of a kind different from and in addition to that suffered by other members of the public

exercising their common rights; their standing on private nuisance as set forth above confers standing on public nuisance arising out of the same activity.\

COUNT 7

Trespass (Kerwin only)

93. Plaintiffs incorporate by reference paragraphs 1 through 92.

94. Plaintiff Kerwin suffer significant harm from the invasion of his interest in the exclusive possession of his land as a direct result of the following regular, continuous, and repeated trespasses by the Defendant Ashland Gun Club, Inc. : trespassory noise, which intrudes upon Plaintiff's land; trespassory contamination with hazardous substances, which intrude upon Plaintiff's land: and trespassory errant bullets, which intrude upon Plaintiff's land.

COUNT 8

Negligence

95. Plaintiffs incorporate by reference paragraphs 1 through 94.

96. Defendants breached their duty of reasonable care to avoid harm to others by negligently or recklessly operating its shooting range, and by failing to adequately supervise those using it so as to prevent unlawful and unauthorized activity. Defendants' negligence created the nuisances and trespasses

1 as set forth above, and was the proximate cause of Plaintiffs'
2 reasonably foreseeable harm.

3 4 **COUNT 9**

5 **Negligence Per Se**

6 97. Plaintiffs incorporate by reference paragraphs 1 through
7 96.

8
9 98. Plaintiffs are a member of the class intended to be
10 protected by ORS chapter 468B.005 to 468B.035, the Oregon
11 Water Pollution Control law, which sets a standard of conduct
12 and due care applicable to Defendants. The foreseeable harm
13 caused to Plaintiffs is of the kind that the stated Oregon law is
14 intended to prevent. Defendant violated the stated Oregon law in
15 its operation of its shooting range, which directly caused
16 pollution of Emigrant Creek and associated waters.

17 18 **RELIEF REQUESTED**

19
20 WHEREFORE, Plaintiff respectfully requests this Court to grant
21 the following relief:

22 A. Issue a declaratory judgment that Defendants have
23 violated and continue to be in violation of Section 301 of the
24 Clean Water Act, 33 U.S.C. § 1311, Oregon Revised Statutes §
25 468B.050, Section 7002(a)(1)(B) of the Solid Waste Disposal
26 Act, 42 U.S.C. § 6972(a)(1)(B), and section 9 (a)(1)(B) of the
27 Endangered Species Act, 16 U.S.C. 1538 (a)(1)(B).
28

1 B. Enjoin Defendants from operating its shooting range in
2 such a manner as will result in further violation of the Clean
3 Water Act, Endangered Species Act and the Solid Waste
4 Disposal Act and enjoin Defendant from operating its shooting
5 range in a manner causing injury to Plaintiffs or the public as set
6 out above. In particular, Plaintiffs seeks an order enjoining
7 Defendants from filling wetlands, from discharging pollutants to
8 waters of the United States and State of Oregon at its shooting
9 range without an NPDES permit, requiring remediation of lead
10 bullets and lead shot so that they no longer pose a threat to
11 health or the environment and to prohibit the placement of lead
12 bullets, lead shot and clay pigeon debris into Emigrant Creek
and its tributaries;

13 C. Issue an injunction requiring Defendants to complete a
14 full soil, surface water sediment, and groundwater contamination
15 assessment of its shooting range and adjacent property to
16 determine the nature and extent of the pollutants that are
17 discharged to surface waters and soil;

18 D. Authorize Plaintiff, for the period beginning on the date of
19 the Court's Order and running for one year after Defendants
20 achieve compliance with the Clean Water Act, Endangered
21 Species Act and the Solid Waste Disposal Act, to sample or to
22 arrange sampling of surface waters, sediments, and soils at, and
23 in the vicinity of, Defendants' shooting range, with the costs of
24 the sampling to be borne by Defendants;

25 E. Order Defendants to provide Plaintiffs, for a period
26 beginning on the date of the Court's Order and running for one
27 year after Defendant achieves compliance with the Clean Water
28 Act, Endangered Species Act and Solid Waste Disposal Act,
with a copy of all reports and other documents which Defendant

1 submits to EPA, or DEQ regarding Defendants' discharges,
2 NPDES permit, or regarding lead bullet and lead shot wastes at
3 the time they are submitted to these authorities;

4 F. Issue a remedial injunction ordering Defendants to pay
5 the cost of any environmental restoration or remediation
6 deemed necessary and proper by the Court to ameliorate the
7 surface water, sediment, soil, and environmental degradation
8 caused by Defendant's violations;

9 G. Order Defendants to pay civil penalties of \$25,000.00 per
10 day of violation for each Clean Water Act violation occurring
11 prior to January 1, 1997, and civil penalties of \$27,500 per day
12 of violation for each Clean Water Act violation occurring
13 thereafter, and civil penalties of \$32,500 per day XXX pursuant
14 to Sections 309(d) and 505(a) of the Clean Water Act, 33
U.S.C. §§ 1319(c) and 1365(a);

15 H. Award Plaintiff its costs, including reasonable attorney
16 And expert witness fees, as authorized by Section 505(d) of the
17 Clean Water Act, 33 U.S.C. § 1365(d), SECTION XXX OF THE
18 ENDANGERED SPECIES ACT and Section 7002(e) of the
19 Solid Waste Disposal Act, 42 U.S.C. § 6972(e);

20 I. Order Defendant to abate the nuisances alleged herein.

21 J. Award compensatory damages to Plaintiff for loss in the
22 value of his land and for loss of value for the diminished use
23 and enjoyment of his land;

24 K. Award Plaintiff non-economic damages for mental
25 anguish suffered;

26 L. Award Plaintiff consequential damages;

27 M. Award Plaintiff costs and disbursements; and

28 N. Award such other relief as this Court deems appropriate.

Dated this 23rd day of December, 2011.

Respectfully submitted,

Thomas Dinitre

Attorney at Law L.L.C.

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